

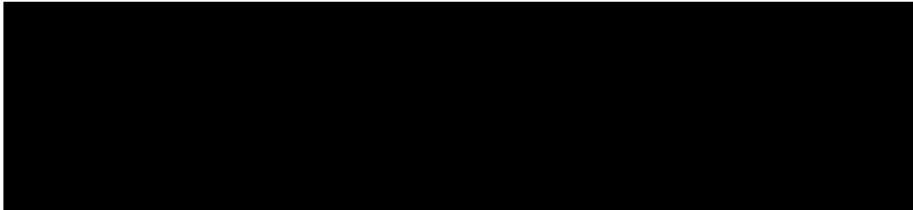
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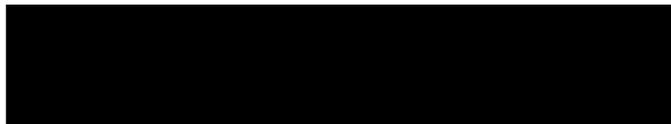
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FILE: SRC 06 119 51370 Office: TEXAS SERVICE CENTER Date: **NOV 26 2007**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a staffing firm and seeks to employ the beneficiary as a computer software designer/systems analyst. It endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because a certified labor condition application (LCA) was not obtained prior to the filing of the Form I-129 petition. On appeal, the petitioner states that a valid LCA was submitted with the filing of the Form I-129.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the Form I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 1182(n)(1)

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition "a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." The regulations further provide at 8 C.F.R. § 214.2(h)(4)(i)(B)(1):

Before filing a petition for H-1B classification in a specialty occupation the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

8 C.F.R. § 214.2(h)(15)(ii)(B)(1) provides that, for a petition extension, the request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a LCA valid for the period of time requested for the occupation. Pursuant to 8 C.F.R. § 103.2(b)(12), "an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. . . ." The Form I-129 petition was filed on or about March 6, 2006. On August 16, 2006, CIS sent to the petitioner a notice of Intent to Deny (NOID), requesting a properly endorsed LCA. The present Form I-129 petition is a request for continuation of previously approved employment without change and with the same employer.¹ The petitioner submitted an LCA certified by the Department of Labor from August 4, 2004 through August 4, 2007. The requested dates of employment for the current petition are September 25, 2006

¹ It is noted that the petitioner has been in approved H-1B status since March 1, 2000, a period exceeding six years.

through the "petition for permanent residency filed." The AAO notes that under the American Competitiveness in the 21st Century Act (AC21) the petitioner may request no more than one year of employment on behalf of the beneficiary, if other conditions are met. As the LCA was timely filed prior to the date of the petition, and expires on August 4, 2007, a properly certified LCA was obtained prior to the filing of the petition for H-1B classification. The director's determination to the contrary is accordingly withdrawn.

The AAO notes that the petition may be approved as the beneficiary is entitled to a one-year extension of stay under AC21 with an expiration date coextensive with the LCA, August 4, 2007.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years." However, AC21 removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by section 11030(A)(a) and (b) of the 21st Century Department of Justice Appropriations Act, reads as follows:

- (a) EXEMPTION FROM LIMITATION – The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(B) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(B)), if 365 days or more have elapsed since the filing of any of the following:
 - (1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).
 - (2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.
- (b) EXTENSION OF H-1B WORKER STATUS – The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one year increments until such time as a final decision is made –
 - (1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;
 - (2) to deny the petition described in subsection (a)(2); or
 - (3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

The record of proceeding before the AAO includes (1) Form I-129 and supporting documentation for a seventh year extension, filed on March 6, 2006; (2) the notice of decision, dated September 28, 2006; and (3) Form I-290B and the petitioner's brief.

Under section 106(a) of AC21, an H-1B nonimmigrant may obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien is the beneficiary of an employment-based immigrant petition or an application for adjustment of status; and (2) 365 days or more have passed since the filing of the labor certification application (formerly Form ETA 750, now Form ETA 9089) that is required for the alien to obtain status as an employment-based immigrant, or 365 days or more have passed since the filing of the employment-based petition (Form I-140).

Part of the 21st Century DOJ Appropriations Authorization Act amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 9089) that is required or used by the alien to obtain status as an employment-based immigrant; or (2) 365 days or more have passed since the filing of the employment-based immigrant petition (Form I-140). Section 106(b) requires that if the application or petition has been denied, an extension petition under AC21 must be denied.

The record indicates that the beneficiary resided in the United States with H-1B classification continuously from March 1, 2000 through March 1, 2006. The petitioner filed a labor certification application (Form ETA-9089) on behalf of the beneficiary on August 16, 2005, followed by the instant petition (Form I-129) on March 6, 2006, to extend the beneficiary's H-1B status by one year.² Since 365 days had passed between the filing of the Form ETA-9089 and the first day of intended employment noted in the extension of status petition (September 26, 2006), the beneficiary is eligible for an exemption from the six-year limitation on his H-1B classification under AC21 section 106(a), and an extension of his H-1B status for a seventh year under AC21 section 106(b). See, *Interim Guidance for Processing From I-140 Employment-Based Immigrant Petitions & Form I-485 & H-1B Petitions Affected by the American Competitiveness in the 21st Century Act of 2000 (AC21)*(Public Law 106-313), William R. Yates, Associate Director for Operations, USCIS (May 12, 2005). The extension petition must accordingly be approved.

The petitioner bears the burden of proof in these proceedings. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The appeal is sustained. The petition is approved until August 4, 2007.

² The Form ETA 9089 was not certified by the Department. The petitioner, however, filed a request for review of that determination and the record reflects that the request for review remains pending.